

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

631

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Roy A. Smith, Jr., Appellant	)	
	)	
vs.	)	No. 19663
	)	
United States of America	)	

APPEAL IN FORMA PAUPERIS FROM JUDGMENT
OF CONVICTION BY THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Paulson
CLERK

John T. Miller, Jr., Esq.
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Counsel for Appellant
(Appointed by this Court)

December 23, 1965

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STATEMENT OF QUESTIONS PRESENTED

1. In a trial upon indictment for housebreaking and larceny, is the accused denied enjoyment of his constitutional rights under the Sixth Amendment to the Constitution of the United States to have compulsory process for obtaining witnesses in his favor where the Court, aware that the impoverished accused has been unsuccessful in his efforts to compel the attendance of witnesses in his favor by subpoena, gives the case to the jury without first having affirmatively determined on the record that the accused knows of his constitutional rights regarding compulsory process and has waived those rights by an intelligent and intentional waiver?

2. In a trial upon indictment for housebreaking and larceny, when the accused may be subject to deprivation of his liberty for as long as fifteen years, has reversible error been committed where the Court instructs the Jury:

a. Both before and after the accused testifies in his own behalf, that the interest of a witness in the outcome of the case is to be considered in determining credibility, especially under circumstances where the Prosecutor commences cross-examination of the accused with enquiries relating

to prior convictions, two of them for larceny;

b. That the element of "intent" in house-breaking can be defined by reference to "the removal of property of another" and "taking the property of another", rather than in terms clearly connoting a larcenous taking;

c. That refusal to obey a prior order of the lawful occupant or owner to leave the premises is a necessary element of the crime of unlawful entry; and

d. That "reasonable doubt" may be defined by reference to decisions the jurors make "in the more weighty and important matters relating to [their] personal affairs".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Roy A. Smith, Jr., Appellant)
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 vs.) No. 19663
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United States of America)

APPEAL IN FORMA PAUPERIS FROM JUDGMENT
OF CONVICTION BY THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Jurisdictional Statement

Appellant was tried on July 6, 1965, by the United States District Court for the District of Columbia pursuant to a grand jury indictment filed in open court on February 15, 1965, charging appellant with violation of Sections 1801 and 2202 of Title 22 of the District of Columbia Code (housebreaking and larceny). The situs of the alleged crimes was in the District of Columbia.

After the conclusion of the Government's case, defendant moved through his court-appointed counsel for dismissal on both counts. The Trial Judge granted the motion

as to the larceny count and denied it as to the other count. Appellant was found guilty after trial on the count of house-breaking and on August 13, 1965, sentenced to two to eight years.

Appellant filed notice of appeal in time and applied for leave to proceed upon appeal in forma pauperis. By order issued August 20, 1965, the District Court ordered that Appellant be authorized to proceed on appeal without prepayment of costs, directed preparation of all of the transcript except voir dire at government expense, and referred to this Court Appellant's request for appointment of counsel.

By order issued November 15, 1965, this Court appointed the undersigned counsel to represent Appellant in this case.

Statement of Case

The Government alleged that on or about December 22, 1964, Appellant entered the apartment of Mrs. Ella McAdoo, 306 Decatur Street, Northwest, with the intent to steal the property of another. The Government sought to prove its case on direct through the testimony of two police officers and Mrs. McAdoo.

On the morning of December 22, 1965, the officers, serving together in plain clothes as members of a special

housebreaking detail, were attracted by the presence of a parked car, later determined to be owned by Mr. Melvin Stanard, which they had observed "just driving about" the day before. They stopped their car and each began to search a different nearby apartment house. One police officer testified that as he entered 306 Decatur Street he saw Appellant leave Mrs. McAdoo's apartment. The other police officer testified that he saw Appellant leave the apartment building. Both officers testified that they saw Appellant drive away in Mr. Stanard's car, after which they both entered 306 Decatur Street, found the door to Mrs. McAdoo's apartment had been "jimmied", entered the apartment and found it "ransacked".

Mrs. McAdoo testified that she had left her apartment about 4:50 A. M., some five hours before the Appellant was seen in the apartment house, did not know Appellant, had not seen him before the trial and had not authorized him to enter her apartment.

The Government failed to prove that anything was taken from the apartment. On motion of defense counsel, the Trial Judge dismissed the larceny count.

Appellant took the stand in his own defense and testified that he was with his wife at the time the alleged crime

occurred on December 22, 1964, in a specific place removed from the scene. His wife corroborated this testimony.

Two persons who might be key witnesses in Appellant's favor did not appear or testify despite Appellant's efforts to obtain their attendance through compulsory process. One of them, Mr. Melvin Stanard, owner of the car which attracted the attention of the police, was twice served with subpoenas by the United States Marshal's Office during an eight-day period by leaving copies at his address; the other person (Terry) was reported not living at the address shown on the subpoena.

The Government presented as a rebuttal witness a bookkeeper who testified that the "reconstructed" records of the wife's employer showed that she had been paid on a claim that she was at her place of work on December 22, 1964. On surrebuttal, Appellant's wife admitted that she had accepted the pay knowing that someone else had signed her in on that day.

Statutes Involved

Section 1801 of Title 22 of the District of Columbia Code provides in pertinent part:

"Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room,

whether at the time occupied or not, . . . with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years."

The Trial Judge also presented instructions on the lesser included offense of unlawful entry, set forth in Section 3102 of Title 22 of the District of Columbia Code, which provides as follows:

"Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$100 or imprisonment in the jail for not more than six months, or both, in the discretion of the court."

Statement of Points

1. Appellant was deprived of enjoyment of his rights under the Sixth Amendment to the Constitution of the United States to compulsory process where the Court knew that the impoverished accused's efforts to obtain two essential witnesses had not been successful and did not affirmatively advise him of his rights on the record and determine that any waiver of those rights was intelligent and intentional.

With respect to Point 1, Appellant desires the Court to read the following pages of the reporter's transcript: 3, 23, 39, 53, 68, 69, 75, 76, 79, 81, 82, 83, 85, 92, 116, 120, 122.

2. The accused was denied a fair trial when his testimony was preceded by an instruction to the Jury that in determining credibility the Jury should consider whether the witness "has any interest in the outcome of the case", an instruction emphasized by repetition twice after the accused had testified. In these circumstances, it is not proper for the Prosecutor to commence cross-examination of the accused by a recital of prior alleged and real convictions.

With respect to Point 2, Appellant desires the Court to read the following pages of the reporter's transcript: 4, 7-8, 51, 70, 67-70, 129, 132.

3. The element of intent in housebreaking, in the context of this case, was not clearly defined as required by law in terms of a larcenous intent; rather it was obscured through use of terms which do not clearly convey the idea of a criminal taking.

With respect to Point 3, Appellant desires the Court to read the following pages of the reporter's transcript: 21, 41, 134, 135, 140, 141.

4. The right of the accused to have the Jury pass on each element of the offense charged was denied by the Court when the lesser crime of unlawful entry was erroneously defined in such fashion that the Jury could not find Appellant guilty of this lesser offense under the facts alleged by the Government.

With respect to Point 4, Appellant desires the Court to read the following pages of the reporter's transcript: 48, 138-142.

5. The standards by which a jury should weigh a decision as to whether proof has been adequate beyond a reasonable doubt should be more weighty than that upon which jurors would be willing to act in the more weighty and important matters relating to their personal affairs.

With respect to Point 5, Appellant desires the Court to read the following pages of the reporter's transcript: 7, 128-9.

Summary of Argument

The Sixth Amendment provides that the accused shall enjoy the right to compulsory process to obtain witnesses favorable to him. The enjoyment of that right was unlawfully denied the accused in this case due to the failure of the Court, before submission of the matter to the Jury, to determine affirmatively on the record (1) that the accused knew

of his rights of compulsory process under the Sixth Amendment, and (2) that he waived these rights intelligently and intentionally. The impoverished accused had unsuccessfully sought to compel the attendance of two witnesses in his favor through issuance of subpoenas. Frequent references to these missing persons appear in the record, in testimony, argument and defense counsel's observations to the Court. The Court never attempted to determine what the absent persons might say if they did appear, thereby conclusively foreclosing himself from any opportunity to exercise his discretion in the matter of continuance.

The accused has the right of a fair trial, including unprejudiced consideration of his testimony by the Jury. Advice given by the Court before any testimony has been received that the Jury, in determining credibility, may consider whether a witness "has any interest in the outcome of the case", an admonition twice repeated to the Jury in closing instructions, unfairly characterized and demeaned testimony by the accused in his own behalf. This erosion of his right to a fair trial was aggravated when the Prosecutor was permitted to cross-examine the accused on prior alleged and real convictions, two of them convictions for larceny, where "intent to steal the property of another"

constitutes an element charged by the Grand Jury in the indictment.

The accused was denied the right to have the Jury pass on each element of the offense of housebreaking. This right was denied when the Court instructed the Jury as to "intent", as used in the statute, in terms of "removal of property of another" or "taking the property of another", words which have no clear larcenous connotation. The erroneous instruction enabled the Jury to measure the alleged misconduct of the accused against a standard of intent not found in the housebreaking statute.

The accused was denied the right to have the Jury pass on each element of the lesser offense of unlawful entry when the Court, in defining the statute, led the Jury to understand that a refusal of an order by the lawful occupant or owner to leave the premises was a necessary element of the crime, when in fact, the statute is stated in the disjunctive. Under the facts as alleged by the Government, Appellant could not be found guilty of the lesser offense as there had been no order addressed to Appellant to quit the premises. If correctly instructed, the Jury might well have acquitted the accused of the charge of housebreaking -- with its maximum sentence of fifteen years -- and found him guilty only

of the misdemeanor of unlawful entry with its substantially lower punishment.

By introducing an inadequate standard of judgment from the world of the jurors' private affairs, the Court provided a confusing and prejudicial dilution of the strict legal standard of proof of guilt "beyond a reasonable doubt" which the Government must meet in a criminal case.

Argument

Had the jury been instructed properly and had Appellant been afforded by the Court a reasonable opportunity to enjoy his constitutional right of compulsory process to obtain witnesses in his favor, he would not have been convicted, we submit, of housebreaking. At most, and giving full credit to the Government's case, the Jury might have found him guilty of the misdemeanor of unlawful entry.

- I. The Trial Judge should not have terminated the trial without first determining affirmatively on the record whether the accused, in an intelligent and competent manner, waived enjoyment of his constitutional right to have compulsory process for obtaining witnesses in his favor.

In preparing to defend himself, the accused sought to subpoena Melvin Stanard and George Terry, both believed to live at 4629 4th Street, Northwest. In his affidavit in

support of his Motion for Issuance of Subpoena,^{1/} dated June 29, 1965, the accused advised the Court that the presence of these witnesses was necessary to demonstrate that he was not at the scene of the crime and could not have committed the crime, and that without the witnesses he could not safely go to trial. (See Appendix A hereto.) Attached to this initial brief as Appendix B is a copy of an affidavit of Appellant, dated December 15, 1965, stating with more particularity what he expected Stanard and Terry to testify about. This affidavit states in pertinent part:

"a) Mr. Melvin Stanard would testify that I did not have his car that day (December 22, 1964); that he (Stanard) had loaned it to Mr. George Terry; and that to his knowledge there was only one set of keys to the automobile;

b) Mr. George Terry would testify that he borrowed the car on December 22, 1964 from Mr. Stanard, took it to work with him, parked it there and found it after work where he had left it, and that he (Terry) did not lend the keys of the car to me or anyone else during that time."

A copy of a subpoena was left at 4629 4th Street, Northwest, for Stanard on June 29. Terry was reported on the same date as known at the same address but not living

^{1/} Appellant was proceeding in forma pauperis with court-appointed counsel. See Rule 17(b) Fed. R. Crim. P.

there.^{1/} On July 6, 1965, at 10:00 A. M., the Trial Judge, at the request of counsel for the accused, issued a forthwith subpoena against Melvin Stanard. This was subsequently returned by the United States Marshal's Office endorsed with the statement, "Tried residence -- no response (12:⁰⁵_{P.M.}) Jul 6 1965".

When the trial began, counsel for the accused advised the court (T. 3):

"The defense is ready, Your Honor. There are forthwith subpoenas out for witnesses.

THE COURT: I realize that.

MR. NEALON: I tried my best, sir. I spent two or three hours on it yesterday."

In the course of cross-examination, Prosecution Witness George C. Awkward of the Metropolitan Police Department stated that the car which had attracted him to the scene of the alleged crime belonged to Melvin Stanard (T. 23), a fact determined immediately after the ransacked apartment was discovered (T. 39).

Appellant's wife testified on direct that at the time of the alleged housebreaking he was at Stanard's house (T. 53),

^{1/} Copies of the subpoenas are not available in the jacket from the court below. This information regarding service was taken from the daily log for June 29, 1965 of Harry J. Cottman, Deputy United States Marshal. Apparently only one attempt was made to serve these two subpoenas.

a fact confirmed by Appellant (T. 68), but Stanard was not at home (T. 53). Appellant testified that he did not use the car and never had access to it on December 22, (T. 69)

On cross-examination by the Prosecutor, Appellant was asked whether he had seen Stanard on December 21 or a Mr. George Terry on December 21 or December 22. (T. 75) Appellant had testified that he saw Stanard on the evening of December 21 (T. 75) and saw both Stanard and Terry on December 22, about 10:00 P. M. (T. 76). This was the first reference to Terry on the record. On redirect, court-appointed counsel for the defense queried the accused as follows (T.79):

"Q You are aware, are you not, that I have issued subpoenas for George Terry and Mr. Stanard and the Marshal's Office was unsuccessful in serving them?

A Yes, I understand that."

On rebuttal, Prosecution Witness Albert C. Yeager, a member of the Metropolitan Police Department, testified that about 2:30 or 3:00 P. M. on December 22 the police had visited Stanard's house and found him out. (T. 81) That evening Stanard and Terry came to the Sixth Police Precinct Station to talk to Officer Yeager. (T. 82) Shortly after these men left the Station the accused came into the Police Station to determine what charges had been placed against Stanard. (T. 82) He was advised that no charges had been made against Stanard. (T. 83) Officer Yeager further

testified that at no time was Terry or Stanard charged with anything in connection with this offense. (T. 85)

After the last witness left the stand, the Court inquired (T. 116):

"Does that finish the case, gentlemen, on both sides?"

MR. NEALON: Yes, Your Honor.

MR. EPSTEIN: I have nothing further, Your Honor."

No continuance was requested by defense counsel to afford the accused time to obtain the attendance of Stanard and Terry as witnesses.

Closing arguments were then made on both sides. In the course of his argument, the Prosecutor stated (T. 120):

"They [the officers] also checked out the car to see if Mr. Stanard knew about the car or whether it was in any way stolen or lost. Mr. Stanard, apparently, did know about the car but was in no way connected with this particular offense. Mr. Stanard was a friend of the defendant. Mr. Stanard was not seen either on the day of December 21st or on the day of December 22nd.

Officer Yeager testified that he knew Mr. Stanard and that he knew Mr. Terry, and he knew them over a long period of years. There is no question in his mind that this man whom they saw coming out of the apartment building was not Mr. Stanard, was not Mr. Terry but was this defendant."

In his closing argument for the Defendant, court-appointed counsel made reference to the same absent witnesses in these terms (T. 122):

"Whoever the person was who ransacked that apartment, whether it be Stanard or Terry or whoever, didn't kick that stuff around with his feet; he had to handle it. And nobody can tell me after a description of that apartment given that some prints wouldn't have been found up there, some legible prints that they could read and find out exactly who committed that crime."

The Trial Judge was aware, therefore, throughout the trial of July 6 that the accused had attempted without success to obtain Stanard and Terry as witnesses in his favor, and that counsel for both Government and the defense sensed that the activities of these two men had to be accounted for before the case could be properly resolved. Being aware of these circumstances, it was reversible error for the Court to allow the trial to march to its conclusion and final judgment without affirmatively protecting Appellant's constitutional rights under the Sixth Amendment.^{1/}

The Sixth Amendment of the United States Constitution provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

^{1/} On July 26, 1965, Appellant filed motion for new trial in the District Court, saying that he had just located two witnesses who would show his innocence. This was denied the same date by the Trial Judge.

The Sixth Amendment involves fundamental rights of life, liberty and property, which were secured for the benefit of people residing in the District of Columbia as well as elsewhere in the country. Callan v. Wilson, 127 U.S. 540, 548, 549 (1888).^{1/} If the safeguards provided by the Amendment are lost, "justice will not 'still be done'". Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

Constitutional rights under the Sixth Amendment may be waived, Yates v. United States, 316 F.2d 718, 725 (10th Cir. 1963), but waiver is never presumed. Courts indulge every reasonable presumption against the waiving of fundamental constitutional rights. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937). Waiver must be intelligent and clearly determined by the trial court in the light of the particular facts and circumstances of the case, including the background, experience and conduct of the accused. Johnson v. Zerbst, 304 U.S. at 465, 467. "Since the waiver of a constitutional right is not to be taken lightly, such direct communication [between Trial Judge and accused] is desirable so

^{1/} For an account of the genesis and evolution of governmental recognition of the right of the accused to have compulsory process to obtain witnesses in his favor, see Story, J., Commentaries on the Constitution of the United States (5th ed. 1891) s 1792; Heller, F. H., The Sixth Amendment to the Constitution of the United States (1951), pp. 106-108.

there can be no question of the defendant's 'intentional relinquishment or abandonment of a known right.'" Hatcher v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 18,971, decided July 2, 1965, Slip Op. pp. 2-3).

Where an accused does not waive his constitutional rights under the Sixth Amendment, a federal court lacks jurisdiction to deprive him of his life or liberty. Johnson v. Zerbst, supra at 463, 468. The judgment of conviction pronounced by a court without such jurisdiction is void. Johnson v. Zerbst, supra at 468.

The simple statement by the accused in response to a question by his counsel that he knew that efforts to obtain witnesses in his favor through use of compulsory process had been unsuccessful does not, we submit, rise to the level of acquiescence required to meet these court-enunciated standards. Nor does it amount to an "affirmative determination" Campbell v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 18, 916, decided June 28, 1965, Slip Op. p. 4) by the Trial Judge that the accused had actual knowledge of his constitutional right to enjoy compulsory process, and that his waiver of these rights was intentional. Hatcher v. United States, supra.

Certainly the short period of time from June 29, when Appellant's forma pauperis Motion for Issuance of Subpoenas

was granted, to July 6, the date of the trial, could not be considered so long as to foreclose, without consideration or argument, a reasonable continuance to permit further search to be made for these witnesses, especially when one bears in mind the intervening Independence Day holiday. Nor can a sole attempt to serve each subpoena constitute enjoyment "in any substantial sense" Powell v. Alabama, 287 U.S. 45, 58 (1932) of a right intended to produce a favorable witness in court. There was no occasion for haste in concluding the proceedings. (See T. 92.)

The Trial Judge showed no awareness of the fact that these constitutional rights were involved in the case. He had been informed through the testimony that Melvin Stanard, owner of the car which attracted the officers to the scene of the alleged crime, and George Terry might be involved in the alleged crime or serve as essential alibi witnesses. This impression was so well established that the Prosecutor found it necessary to assert in closing argument (T. 120) that Stanard and Terry were not involved in the alleged crime, statements not supported by and in material respects contrary to the evidence of record. See Cross v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 19,270 decided November 2, 1965).

The accused testified that he and his wife were in a different part of the city at the time of the alleged crime. Consequently, there was no witness present to contradict the essential statements of the police officers that Stanard's car was present at the scene of the alleged crime and that it was the presence of this car that caused them to stop and search the nearby apartment houses. Thus, Stanard's testimony was essential to a determination as to who had the car on December 22 and, more specifically, whether the accused had it. Had he appeared, Terry was expected by the accused to testify that he, Terry, not the Appellant, borrowed the car from Stanard on the day in question.

From the foregoing, it can be reasonably anticipated that had Stanard and Terry testified, the accused would have been acquitted of the offense of housebreaking. Under the circumstances, the accused did not and could not have the fair trial which the Fifth and Sixth Amendments to the Constitution are intended to safeguard.

It was incumbent on the Trial Judge to bring to the notice of the accused that he had not been able to enjoy his constitutional right of compulsory process due to circumstances beyond his control, and to afford the accused opportunity to argue for a continuance to a day when these key witnesses might be present.

While the grant of continuance for the purpose of locating missing witnesses may be termed discretionary in appropriate circumstances, Feguer v. United States, 302 F.2d 214, 241 (8th Cir. 1962), cert. denied 371 U.S. 872 (1962), an abuse of discretion per se is created by the failure of the Trial Judge to affirmatively raise the question whether a continuance would not be appropriate when the identity of important missing witnesses is brought to his attention, the accused has had little time to obtain their attendance by subpoena, and the Judge has not informed himself as to what the witnesses might say if they appeared, and the Judge has not determined whether the accused knows that the enjoyment of his constitutional rights will be forfeited if the case goes to the Jury and to final decision in the absence of the witnesses. See Johnson v. Zerbst, 304 U.S. 458, 465 (1938); Hatcher v. United States, supra; Campbell v. United States, supra; Poe v. United States, 233 F.Supp. 173 (D.C. 1964), aff'd _____ U.S. App. D.C. _____, _____ F.2d _____ (No. 18,964, decided June 2, 1965); Yates v. United States, 316 F.2d 718, 725 (10th Cir. 1963); Paoni v. United States, 281 Fed. 801 (3d Cir. 1922). It was the duty of the court to see that the accused was denied no necessary incident of a fair trial. Powell v. Alabama, 287 U.S. 45, 52 (1932).

There was no showing of bad faith on the part of the accused, simply a lack of sophisticated understanding that his constitutional rights were draining away unstaunched by Court intervention.

That defense counsel did not ask for a continuance or object to submission of the case to the Jury in the absence of the testimony of the missing witnesses cannot adversely affect Appellant's right to raise these issues on appeal or this Court's powers to reverse the judgment below. Both counsel and Court have an obligation to inform the accused as to his basic rights. See Scrows v. United States, 325 U.S. 91, 107 (1945); Poe v. United States, 233 F.Supp. 173 (D.C. 1964), aff'd ____ U.S. App. D.C. ____, ____ F.2d ____ (No. 18,964, decided June 2, 1965); Jackson v. United States, ____ U.S. App. D.C. ____, 348 F.2d 772 (1965); Mills v. United States, ____ U.S. App. D.C. ____, 228 F.2d 645, 646 (1955).

II. The Trial Judge committed prejudicial error in his instructions to the Jury.

The Trial Judge committed several errors in instructing the Jury which, taken collectively or individually, are sufficiently prejudicial to require reversal of the judgment below.

The fact that defense counsel took no exception to these erroneous instructions does not deprive this Court of

its jurisdiction to review and the power to redress. These errors are fundamental, as we shall show, and justify reversal. See Screws v. United States, 325 U.S. 91, 107 (1945); Rule 52(b) Fed. R. Crim. P.

- A. The weight to be given the testimony of the accused and his wife was unfairly diminished by the Court, a result inflamed by the Prosecutor's recital of Appellant's past alleged and real convictions.

Before receiving any evidence, the Court began the trial with a little orientation lecture to the jurors. This was justified on the ground that some of the jurors "are not experienced."^{1/} (T. 4) In the course of this instruction, the Trial Judge stated:

"In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you may consider any matter that may have a bearing on the subject. For instance, you may consider . . . whether he has any interest in the outcome of the case." (Emphasis supplied) (T. 7-8)

Before any witness testified, two neat pens were constructed for the convenient use of the jurors: one for "interested" witnesses, another for "disinterested" witnesses. Of the witnesses who subsequently appeared, only the Appellant and

^{1/} These qualified jurors serving in July 1965 were sworn in on June 24, 1965 by Chief Judge Matthew McGuire and Judge William B. Jones. Each juror was supplied with a copy of "Jury Service -- A Manual for the Juror."

his wife could be said to have an "interest in the outcome of the case" within the intendment of the Judge's instruction. The Jury was ready to view their testimony with a jaundiced eye.

Appellant's testimony on direct was very brief. (T. 67-70) It confirmed that he had been in the company of his wife on the morning of December 22, had not borrowed Stanard's car that day, and was not in the vicinity of 306 Decatur Street where the alleged housebreaking occurred. This was followed by nine pages of cross-examination by the Prosecutor prefaced by the following questions:

"Q Are you the same Roy Alphonso Smith, Jr., who was convicted of destroying private property in October of 1959?

A Yes, I am.

Q Are you the same Roy Smith, Jr., who was convicted of petty larceny in December of 1959?

A Yes, I am.

Q Are you the same Roy Smith, Jr.; who was convicted of petty larceny in April of 1961?

A Yes, I am.

Q Are you the same Roy Smith, Jr., who was convicted of three counts of unauthorized use of a vehicle in December of 1962?

A No, I am not. The case was reversed by the Court of Appeals.

Q Were you convicted in January of 1963 of unauthorized use?

A No, I was not." (Emphasis supplied) (T. 70)

So Appellant was cast in the role of thief, only shortly after his counsel had persuaded the Trial Judge to dismiss the larceny count of the indictment (T. 51). And part of the persuasion was accomplished by reference to two crimes (out of five mentioned) for which he was not lawfully convicted.

Defense counsel did not object to these questions by the Prosecutor.

In his further instructions to the Jury upon the conclusion of the presentation of evidence, the Trial Judge repeated the admonition made at the beginning of the trial regarding evaluation of the testimony of interested witnesses (T. 129):

"In this connection you have a right to consider . . . whether the witness has any interest in the outcome of this proceeding or its results, or friendship or animosity towards the persons concerned herein. . . ." (Emphasis supplied)

The Trial Judge further observed (T. 132):

"You are further instructed that while the law makes the defendant a competent witness in this case, yet you have the right to take into consideration his situation and his interest in the result of your verdict and all the circumstances surrounding it and give to his testimony only such weight as in your judgment it is fairly entitled to." (Emphasis supplied)

The effect of these instructions, together with the cross-examination as to his alleged and real prior convictions, had the effect, we submit, of inoculating the Jury

against a belief in the credibility of Appellant and his wife, and disposed them to believe the police officers -- witnesses who assumedly do not have "any interest in the outcome of the case" (T. 8) within the meaning of the Trial Judge's instruction.

The instruction at the end of the trial (T. 131-2), designed to place the cross-examination of the accused on prior convictions in their proper perspective, was destroyed by the immediate repetition by the Trial Judge, for the third time, of the caveat "you have the right to take into consideration his situation and his interest in the result of your verdict". (T. 132)

Appellant was convicted of housebreaking, in reality, on the testimony of only one witness, Officer Awkward, who allegedly saw him leave the apartment. No one else put Appellant in the apartment. There was no fingerprint or other scientific corroboration of this essential part of the officer's testimony. (T. 111) The success of Appellant's alibi turned on the amount of credibility given it by the Jury. Onto the delicate balance of belief, the Trial Judge dropped a heavy hand on the side of "disinterested" testimony. In the circumstances of this case, this action of the Trial Judge constituted reversible error.

Questions as to the prior offenses, ostensibly invoked solely to aid the Jury in estimating the credibility of the accused, showed him guilty of prior larcenies and indirectly led the jurors to infer that he was guilty of the crime of housebreaking by providing a phoney proxy for missing proof of larcenous intent. In this case, the prejudicial effect of impeachment of Appellant far outweighed the probative relevance of the prior alleged and real convictions to the issue of credibility. See Luck v. United States, ____ U.S. App. D.C. ____, 348 F.2d 763, 768-769 (1965); Jones v. United States, ____ U.S. App. D.C. ____, 338 F.2d 553, 555, fn. 4 (1964).

B. The element of intent in the crime of housebreaking was deprived of its essential criminal character.

After reading most of the relevant criminal statute on housebreaking (T. 134), the Trial Judge defined "intent" as used in the statute in these terms:

"... the breaking or entry or entry without breaking must be done with the specific intent to commit a criminal offense, which in this particular case would be -- if proved -- the removal of property of another." (Emphasis supplied) (T. 135)

After the Jury retired to the jury room to consider its verdict, the foreman of the Jury submitted a note to the Trial Judge, requesting a further explanation of the statutes

on housebreaking and unlawful entry.^{1/} Specifically, the Jury wanted an explanation as to the difference between the two statutes. (T. 140)

In response to this request, the Trial Judge referred once more to intent in connection with the crime of housebreaking in these terms:

"... but most important the breaking and entering must be done with the specific intent to commit some criminal act. And in this case the indictment, which I believe you have, charges that it was with the intent of taking the property of another from that place." (Emphasis supplied)
(T. 141)

Actually, the indictment charged Appellant "with intent to steal property of another." (Emphasis supplied)

It is not enough, we submit, to define larcenous intent in terms of removal or taking the property of another. This Court has held that an intent to steal is an essential ingredient of the count of housebreaking in this case. See Stewart v. United States ____ U.S. App. D.C. ____, 324 F.2d 443 (1963); Mills v. United States, ____ U.S. App. D.C. ____, 228 F.2d 645 (1955).

^{1/} The note signed by the foreman of the Jury is to be found in the jacket in Criminal No. 145-65. It reads as follows:

"July 6, 1965

To whom it may concern:

We would like to request a copy explaining the statutes [sic] of Housebreaking and Unlawful entry.

Harold A. Cardoza
Foreman"

"Removal" has no larcenous connotation. It is defined in Black's Law Dictionary (4th ed. 1951) in these terms:

"Removal. In a broad sense, the transfer of a person or thing from one place to another. *Durrett v. Woods*, 155 La. 533, 99 So. 430, 431. As used in statutes relative to removal from state is often limited to such absence from state as amounts to a change of residence. *Smithers v. Smithers*, 145 La. 752, 82 So. 879, 880."

"Take", on the other hand, is a term of many meanings. It does not plainly describe a criminal act. It is defined in Black's Law Dictionary (4th ed. 1951) in these terms:

"Take. To lay hold of; to gain or receive into possession; to seize; to deprive one of the use or possession of; to assume ownership. *City of Durham v. Wright*, 190 N.C. 568, 130 S.E. 161, 163.

Thus, constitutions generally provide that a man's property shall not be taken for public uses without just compensation. *Evansville & C.R. Co. v. Dick*, 9 Ind. 433; *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 P. 993, 998, 24 A.L.R. 294; *Piper v. Ekern*, 180 Wis. 586, 194 N.W. 159, 162, 34 A.L.R. 32. Property may be deemed 'taken' within the meaning of these constitutional provisions when it is totally destroyed or rendered valueless, *Lund v. Salt Lake County*, 58 Utah 546, 200 P. 510, 513; or when it is damaged by a public use in connection with an actual taking by the exercise of eminent domain, *City of St. Louis v. St. Louis, I. M. & S Ry. Co.*, 272 Mo. 80, 197 S.W. 107, 111; or when there is interference with use of property to owner's prejudice, with resulting diminution in value thereof, *Webster County v. Lutz*, 234 Ky. 618, 28 S.W.2d 966, 967. But acquisition of title or total destruction of value is not essential to 'taking,' for which compensation must be made. *Cheves v. Whitehead*, D.C.Ga., 1 F.Supp. 321, 324.

The word take has many shades of meaning, precise meaning which it is to bear in any case depending on the subject with respect to which it is used. Kennedy v. New York Life Ins. Co., 178 Misc. 258, 172 So. 743, 745.

In the law of larceny, to obtain or assume possession of a chattel unlawfully, and without the owner's consent; to appropriate things to one's own use with felonious intent. Thus an actual taking is essential to constitute larceny. 4 Bl. Comm. 430. A 'taking' occurs when a person with a preconceived design to appropriate property to his own use obtains possession of it by means of fraud or trickery. People v. Edwards, 72 Cal.App. 102, 236 P. 944, 948.

In this connection, 'take' is not synonymous with 'obtain,' which embraces many other ways of acquiring property. Allen v. State, 97 Tex.Cr.R. 467, 262 S.W. 502, 503. Nor is 'take' necessarily synonymous with 'steal.' Hunt v. State, 89 Tex.Cr.R. 89, 229 S.W. 869, 871; Louisville & N. R. Co. v. Malone, 200 Ala. 380, 76 So. 296, 297. But the phrase 'take by stealth' may have the same meaning as 'steal.' Roach v. State, 23 Okl.Cr. 280, 214 P. 563, 564.

To seize or apprehend a person; to arrest the body of a person by virtue of lawful process. Thus, a capias commands the officer to take the body of the defendant. Com. v. Hall, 9 Gray, Mass., 267, 69 Am.Dec. 285.

To acquire the title to an estate; to receive or be entitled to an estate in lands from another person by virtue of some species of title. Thus one is said to 'take by purchase,' 'take by descent,' 'take a life-interest under the devise,' etc. In re Bock, 125 Misc. 653, 211 N.Y.S. 621, 622.

To receive the verdict of a jury; to superintend the delivery of a verdict; to hold a court. The commission of assize in England empowers the judges to take the assizes; that is, according to

its ancient meaning, to take the verdict of a peculiar species of jury called an 'assize;' but, in its present meaning, 'to hold the assizes.' 3 Bl. Comm. 59, 185. To choose; e.g., ad capiendas assisas, to choose a jury.

To procure or to obtain (an appeal). Nessans v. Colomes, 136 La. 1051, 68 So. 122; Cochran v. State, 206 Ala. 74, 89 So. 278."

To take the property of another is not clearly the same as to steal.

The Trial Judge's unprecise descriptions erroneously suggest that something less than larcenous intent will suffice to support a verdict of guilty of housebreaking. Appellant was denied, as a consequence, his right to have the Jury pass on each element of the offense. See Morisette v. United States, 342 U.S. 246 (1952); Mills v. United States, supra; Byrd v. United States, ____ U.S. App. D.C. ____, 342 F.2d 939 (1965).

How, then, was Appellant convicted of housebreaking? The Jury could conclude that the element of intent was not important. This would make housebreaking and unlawful entry sound like the same crimes. Not surprisingly, the confused Jury asked the Court for further instructions. (T. 140) When they came back to the court room for clarification as to the distinction between the crimes, the Trial Judge so defined unlawful entry, as we point out in the next part of this brief, as to make it inapplicable to the fact situation

being argued by the Prosecutor, leaving the Jury no choice but to find Appellant guilty of housebreaking or acquit. The aura of larceny created by the dismissed count of larceny which was maintained by the Prosecutor's enquiry into past convictions for larceny, the references to the "ransacking" of the apartment without anything being stolen (which might fall within the Trial Judge's terminology of "removal" or "taking",^{1/} these tipped the balance against Appellant.

- C. A refusal to comply with the request of the lawful occupant or owner to leave the premises was made an essential element of the crime of unlawful entry.

After the Trial Judge had instructed the Jury for the first time as to housebreaking, request was made by counsel for an instruction on unlawful entry. (T. 138) The Trial Judge read the applicable statute (T. 139) but failed to provide the Jury any assistance in understanding the statute. As we have already remarked, the puzzled Jury asked for clarification.^{2/} (T. 140) The Jury returned to the court

^{1/} The police officers testified that a heater had been "taken out" of the closet (T. 21), "things had been moved up to the door". (T. 41)

^{2/} The note from the foreman of the Jury requesting assistance is set out in footnote 1, p. 28, supra. See also discussion under II B supra.

room and the Trial Judge defined unlawful entry in these terms (T. 141-2):

"Now, by contrast, an unlawful entry simply means that someone enters upon the premises lawfully occupied by another without their consent and, if asked to leave, refuses to leave at the request of the lawful occupant.

A quick example that comes to mind -- Let us say some loiterer walks into the lobby of an apartment. He is asked by the desk clerk to leave, he is interfering with the traffic in the apartment building. He is there without the consent of the owner and he is there after the owner has asked him to leave and had a perfect right to ask him to leave but he is not there with intent to commit any crime, to steal or to do anything else. He is just hanging around the premises. That is an unlawful entry. It could be the same, entering someone's apartment without their permission. He may not be entering for the purpose of stealing or marring the furniture or doing anything unlawful, but he is there without the consent of the lawful occupant.

So in substance, the housebreaking requires a specific intent after the entry of committing a crime, and the unlawful entry does not require any specific intent to do anything after the entry except to remain on the premises without the consent of the owner." (Emphasis supplied)

The Trial Judge did not correctly define unlawful entry. The statute reads in the disjunctive, although the text given to the Jury by the Court, as shown in the transcript, is not complete:^{1/}

^{1/} The correct text is set forth supra under the heading "Statutes Involved".

"Any person who without lawful authority enters or attempts to enter any public or private dwelling, building or other property or part of such building, dwelling or other property against the will of the lawful occupant or of the person lawfully in charge of such building, or being therein or thereon shall refuse to quit the same on demand of the lawful occupant or of the person lawfully in charge thereof is also guilty of a misdemeanor." (Emphasis supplied) (T. 139)

By defining the crime of unlawful entry in the conjunctive, the Trial Judge made it impossible for the Jury to find on the facts in this case that Defendant committed the crime of unlawful entry as no one contended that Appellant remained in Mrs. McAdoo's apartment after being told to leave. (See T. 48)

In view of the Jury's interest in obtaining clarification on the distinction between housebreaking and unlawful entry (T. 140), it is a fair inference that the Jury felt that the accused should be punished in some fashion on the basis of the evidence elicited during the trial, but could not agree as to whether he might be found guilty of the lesser crime of unlawful entry, which carries with it a smaller penalty. (Fifteen years maximum for housebreaking; six months for unlawful entry.)

By his instruction, the Trial Judge foreclosed further consideration by the Jury of unlawful entry as a possible basis for conviction and deprived Appellant of his right

to have the jury pass on each element of the offense.

"Obviously, if the jury is to function effectively, it must be given a clear statement of each element which the Government must prove. The elements, as expressed in the statute, are hardly set forth with sufficient clarity to permit the jury to perform its duty intelligently." Jackson v. United States, ____ U.S. App. D.C. ____, 348 F.2d 772, 774 (1965).

It is the duty of the Court to give proper instructions on each element of the crime, even though no request is made by defense counsel, nor objection made. Byrd v. United States, ____ U.S. App. D.C. ____, 342 F.2d 939 (1965). "Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed." Screws v. United States, 325 U.S. 91, 107 (1945).

- D. Proof beyond a reasonable doubt, requisite to conviction in a criminal case, was erroneously measured by reference to the jurymen's standards of conduct of their personal affairs.

In his opening orientation of the Jury, the Trial Judge defined the standard of reasonable doubt, in part, in these terms:

"But if after such impartial comparison and consideration and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would not hesitate to act upon in the more weighty and important matters pertaining to your personal affairs, then you have no reasonable doubt." (Emphasis supplied) (T. 7)

In his terminal instruction, the Trial Judge repeated the same instruction almost verbatim. (T. 128-9)

This language is to be contrasted with the following far more restrictive instruction approved by the Supreme Court in Miles v. United States, 103 U.S. 304, 309 (1880):

"A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interest."
(Emphasis supplied)

When it be considered that, for the most part, the more weighty and important matters affecting the private affairs of persons include matters which do not require weighing the retention or loss of personal liberty, it will be appreciated that the juror might well conclude from the Court's advice that he was free to decide against the accused on the basis of evidence which contained a large element of speculation and surmise.

In personal affairs of an economic and financial nature one ordinarily must deal with estimates as to future trends in that part of the economy which circumscribes each one of us. Decisions in this realm necessarily involve the exercise of judgment in the face of a large number of facts

which are unknown and unknowable and beyond the control of the private person making the decision.

In a criminal case, by contrast, the jury is concerned with evidence that occurred in the past. These are facts, knowable and measurable, although the vehicles by which those facts can be made known might be missing from the court room or present but operating in a defective manner. The jury is attempting to determine what actually happened.

Where, as in this case, essential witnesses are not present, the elements of the crimes charged ill-defined, and the accused prejudiced by reference to past alleged and real convictions, then the evidence of the Government has not persuaded beyond a reasonable doubt and the Court's instruction quoted above could only serve to confuse the jurors.

"Reasonable doubt" in a man's private affairs involves a degree of doubt as to the motivations of persons, the purposes and practices of complex federal, state and local governments, and as to the facts of the future. Admittedly, decisions can be and are made in that uncertain atmosphere. One might in a colloquial sense say that a person in his more weighty and important personal affairs can and does act in the presence of evidence which permits accession to a certain course of action beyond a reasonable

doubt. But this secularization in the court room of a legal term used to define the level of proof imposed on the Government serves to dilute, to the Defendant's harm, whatever the juror is instructed must be the higher level of Government proof requisite to a finding of guilt.

The Court's charge should have been in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act. Holland v. United States, 348 U.S. 121, 140 (1954); Jones v. United States, ____ U.S. App. D.C. ____, 338 F.2d 553, 555 (1964).

Conclusion

For the reasons set out above, the judgment of the court below should be reversed and vacated and Appellant released from custody.

Respectfully submitted,

John T. Miller, Jr.
Counsel for Appellant
(Appointed by This Court)

Washington, D. C.

December , 1965

[Copy]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

vs.

ROY A. SMITH, JR.

)
)
)
)
)

Criminal No. 145-65

AFFIDAVIT IN SUPPORT OF MOTION
FOR ISSUANCE OF SUBPOENA

DISTRICT OF COLUMBIA, to wit:

I, Roy A Smith Jr, being first duly sworn according to law, depose and say that I am the defendant in the above-entitled cause, and in support of the annexed motion, in compliance with the requirements of Rule 17(b) of the Federal Rules of Criminal Procedure, state as follows:

1. That the names and addresses of the witnesses referred to in the annexed motion are:

George Terry, 4629 - 4th St. NW, Wash. DC

Melvin Stanard, 4629 - 4th St. NW, Wash. DC

2. That the testimony which he (or they) is expected to give, if subpoenaed, is: that I was not at the scene of the crime.

3. That the evidence of the witness or witnesses is material to the defense because it proves that I could not have committed the crime.

4. That I cannot safely go to trial without the said witness or witnesses.

5. That I do not have sufficient means and am actually unable to pay the fees of the witness or witnesses.

/s/ Roy A. Smith, Jr.

Subscribed and sworn to before me this 29 day of June 1965.

[SEAL]

/s/ [Illegible]

Notary Public, D. C.

My commission expires June 14, 1970

[This is a copy of an affidavit, the original of which is filed by Appellant with the United States Court of Appeals for the District of Columbia together with his initial brief on appeal in No. 19663.]

AFFIDAVIT

City of Washington)
) SS
District of Columbia)

Roy A. Smith, Jr., being first duly sworn, deposes and says:

1. That he is the same Roy A. Smith, Jr. who executed an affidavit on June 29, 1965 in support of Motion for Issuance of Subpoena filed that date in United States v. Roy A. Smith, Jr., Criminal No. 145-65, United States District Court for the District of Columbia;

2. That he expected the witnesses identified in the said Motion to testify more particularly as follows:

a) Mr. Melvin Stanard would testify that I did not have his car that day (December 22, 1964); that he (Stanard) had loaned it to Mr. George Terry; and that to his knowledge there was only one set of keys to the automobile;

b) Mr. George Terry would testify that he borrowed the car on December 22, 1964 from Mr. Stanard, took it to work with him, parked it there and found it after work where he had left it, and that he (Terry) did not lend the keys of the car to me or anyone else during that time.

/s/ Roy A. Smith Jr

Subscribed and Sworn to by Roy A. Smith, Jr. this 15th day of December 1965.

HARRY M. HULL, Clerk

By /s/ Lawrence Proctor
Deputy Clerk

[SEAL]

REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Roy A. Smith, Jr., Appellant)
)
) No. 19,663
)
United States of America)

APPEAL IN FORMA PAUPERIS FROM JUDGMENT
OF CONVICTION BY THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 29 1966

Nathan J. Paulson
CLERK

John T. Miller, Jr., Esq.
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036

Counsel for Appellant
(Appointed by This Court)

January 26, 1966

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Roy A. Smith, Jr., Appellant)
)
 vs.) No. 19,663
)
United States of America)

APPEAL IN FORMA PAUPERIS FROM JUDGMENT
OF CONVICTION BY THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

Some of the arguments set out in Government's Brief
warrant comment.

I.

Appellant did not enjoy his
constitutional right of com-
pulsory process.

Government concedes that Appellant did not waive his
right of compulsory process. Reliance is placed instead on
the contention that Appellant exercised the right on two oc-
casions -- June 29 and July 6, 1965 -- and, therefore, "enjoyed"
the right of compulsory process safeguarded by the Sixth
Amendment. (Govt. Br. pp. 6 - 7) With this we cannot agree.

The right of compulsory process means the right of the assistance of the processes of the Court to obtain the testimony of witnesses favorable to defendant. It is a right safeguarded by a constitutional amendment designed to provide an essential barrier "against arbitrary and unjust deprivation of human rights." Johnson v. Zerbst, 304 U.S. 458, 468 (1937) What witnesses will be compelled to appear is a matter for defendant and his counsel to decide. That decision is not to be made by the prosecutor or the person under subpoena, United States v. Seeger, 180 F.Supp. 467 (SD NY 1960), nor, we submit, by the United States Marshall's office. It is a right to be enjoyed "whether requested or not" unless waived by accused in a manner showing his express and intelligent consent. Bridwell v. Aderhold, 13 F.Supp. 253, 254 (N.D. Ga. 1935), aff'd 92 F.2d 748 (5th Cir. 1937), reversed on other grounds sub nom. Johnson v. Zerbst, 304 U.S. 458 (1937).

Government argues that this valuable right was "enjoyed" by Appellant as a result of its exercise through issuance of subpoenas and their fruitless service on June 29 and July 6, 1965. But this is to elevate form over substance. Acceptance of Government's argument would change a fundamental right into a caricature.

The constitutional right of compulsory process was the fruit of a revulsion against the early common law practice in England under which the accused in capital cases was not permitted to exculpate himself by the testimony of any witness.

"Of this practice the courts grew so heartily ashamed, from its unreasonable and oppressive character, that another practice was gradually introduced of examining witnesses for the accused, but not upon oath; the consequence of which was, that the jury gave less credit to this latter evidence, than to that produced by the government. Sir Edward Coke denounced the practice as tyrannical and unjust; and denied, that, in criminal cases, the party accused was not to have witnesses sworn for him." ^{1/}

It was not until the Eighteenth Century, during the reign of Queen Anne, that witnesses were sworn for, as well as against, the accused in all cases of treason and felony. ^{2/}

This right, whose very existence was so painfully and slowly recognized by Government, needed a constitutional safeguard against further abuse. ^{3/}

Mr. Justice Story concludes his comments on the origins of the Sixth Amendment protections of the rights to compulsory process and to counsel with these apt observations:

"The wisdom of both of these provisions is, therefore, manifest, since they make matter of constitutional right, what the common law had left in a most imperfect and questionable state. [Fn. omitted] The right to have witnesses sworn, and counsel employed for the prisoner, are scarcely less important privileges, than the right of a trial by jury. The omission of them in the constitution is a matter of surprise; and their present incorporation is matter of honest congratulation among all the friends of rational liberty." ^{4/} (Emphasis supplied)

^{1/} Story, Commentaries on the Constitution of the United States, Vol. III, § 1786, pp. 663-4 (1833).

^{2/} Id. at 663.

^{3/} See Heller, The Sixth Amendment to the Constitution of the United States (1951) p. 107.

^{4/} Story, op. cit. at pp. 665-666.

In short, the right to compulsory process is "the right to have witnesses sworn". It is not a sterile right exhausted by an application for a subpoena and the energizing of the United States Marshall's office to a one time sally forth in a fruitless quest for a witness. It is a substantial right, an essential right, meaningful only in terms of the fruit of its exercise, namely, the production of witnesses in open court favorable to the accused.

Appellant enjoyed no such constitutionally-protected right in this matter.

II.

Appellant was prejudiced by reference
to prior indictments and convictions.

Government suggests that Appellant should have obtained a preliminary ruling foreclosing references on cross-examination by the prosecutor to prior convictions. It is further argued that Appellant was not prejudiced by reference to crimes for which he was not convicted, citing a forty-year old decision of this Court. Clifton v. United States, 54 App. D.C. 104, 106, 295 Fed. 925, 927 (1923). (Govt. Br. pp. 7 - 8)

We submit that the applicable law is more correctly summed up in United States v. Yarbrough, ____ F.2d ____ (6th Cir. No. 16146, decided November 9, 1965):

"There is more to reverse this conviction. Although it is well settled that the defendant, when he takes the stand in his own behalf, may

be cross-examined as to prior convictions to affect his credibility as a witness, such examination should not be conducted in a manner to prejudice him in the eyes of the jury. Guilt must be found for the crime charged, not because of past crimes. Thus it has been held that an inquiry into a conviction, where the prosecution knew or should have known that there was no such conviction, was prejudicial error. Pearson v. United States, 192 F.2d 681 (6th Cir. 1951). In addition, it is well established in federal courts that it is reversible error to permit inquiry into defendant's prior indictments which did not result in convictions. An indictment has no probative value. Only a conviction for a felony may be asked about to impeach a defendant's credibility. E.g. United States v. Pennix, 313 F.2d 524 (4th Cir. 1963); United States v. C. L. Guild Const. Co., 193 F.Supp. 268 (D.R.I. 1961); 58 Am. Jur. § 755. ..."

This Court's concern over the deleterious effect of references by the prosecution to prior convictions expressed in Luck v. United States, ____ U.S. App. D.C. ____, 348 F.2d 763 (1965) has been vindicated in this case.

III.

Counsel's failure to except to the Court's Instructions cannot deprive Appellant of his rights.

(A) Government argues that several errors in the instructions of the Court below cannot provide the basis for reversal because the errors are harmless and Appellant's court-appointed counsel failed to object, citing Rule 30, F. R. Crim. P. (Govt. Br. pp. 8-13) We submit that the errors alleged affect substantial rights and so come within the

overview of Rule 52(b),^{1/} F. R. Crim. P. See Screws v. United States, 325 U.S. 91 (1945). The denial of Appellant's fundamental rights cannot be remediless because his counsel failed to object. See Jackson v. United States, ____ U.S. App. D.C. ____, 348 F.2d 772 (1965).

(B) Government argues that a reading of the housebreaking statute to the jury was sufficient instruction to the jury, Wheeler v. United States, 89 U.S. App. D.C. 143, 190 F.2d 663 (1951), offsetting any errors in the Trial Judge's elaborating instructions on the elements of the crime. (Govt. Br. p. 10) However, we invite the Court's attention to the following statement in the Wheeler opinion which shows that it is an unhelpful precedent here:

"The language of this statute [impersonating a police officer] is clear and concise; it contains no words that are obscure, ambiguous or which are used in some restricted, special, or technical sense which the average layman cannot be expected to understand." Id. at 143.

The statute setting forth the crime of housebreaking is rather lengthy. The reference to intent, an essential element, is buried in the text and requires elucidating comment by the trial judge. See Jackson v. United States, supra.

The Trial Judge attempted this task in the Court below but ended up by confusing the Jury, a confusion not obviously

^{1/} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

dissipated by the jurors' recollection of the statute which was read to them. They requested further explanation. (T. 140) Instead of rereading the housebreaking statute, the Trial Judge sought to define the elements of the crime in his own words, once more erroneously describing the element of intent (T. 141).

(C) The Trial Judge did not read to the Jury the complete text of the statute defining the misdemeanor of unlawful entry. (T. 139) Under such circumstances, Wheeler clearly could not justify the Trial Judge's erroneous instructions on unlawful entry. Apparently sensing this, Government seeks to excuse the Trial Judge's errors in instructing the Jury as to the crime of unlawful entry on other grounds: "the jury did not have to reach consideration of the lesser-included offense of unlawful entry". (Govt. Br. p. 13)

But the fact of the matter is that the Jury was considering both offenses, as evidenced by their request to the Trial Judge for an explanation as to the differences between the two statutes (T. 140), and Appellant was improperly deprived of his right to have the Jury pass on each element of the offense of unlawful entry even though no request was made by defense counsel. Jackson v. United States, supra.

IV.

Proof beyond a reasonable doubt cannot be measured by standards of decision employed by jurors in their personal affairs.

Government answers Appellant's argument with a potpourri of quotations and citations which serve to obscure rather than to clarify the issue. (Govt. Br. pp.13-14)

Circuit Judge Wright correctly identified the problem and, we submit, provided its correct resolution in Scurry v. United States, ____ U.S. App. D.C. ____, 347 F.2d 468, 470 (1965), one of the cases here relied upon by Government:

"Being convinced beyond a reasonable doubt cannot be equated with being 'willing to act * * * in the more weighty and important matters in your own affairs.' A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary.

The jury, on the other hand, is prohibited from convicting unless it can say that beyond a reasonable doubt the defendant is guilty as charged. Thus there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him. To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt."

It might be appropriate for a juror to apply standards which he employs in making judgments in his private affairs in arriving at the conclusion that the Government failed to meet its burden of proof beyond a reasonable doubt. In other

words, he should acquit if he would hesitate to act in his personal affairs on the basis of such proof. But to couch the instruction in terms which would permit the Government's burden to be met by proof on the basis of which the juror would be willing to act or would not hesitate to act in his personal affairs denies the defendant the benefit of a reasonable doubt and constitutes plain error. See Holland v. United States, 348 U.S. 121, 140 (1954); Jones v. United States, ____ U.S. App. D.C. ____, 338 F.2d 553, 555 (1964).

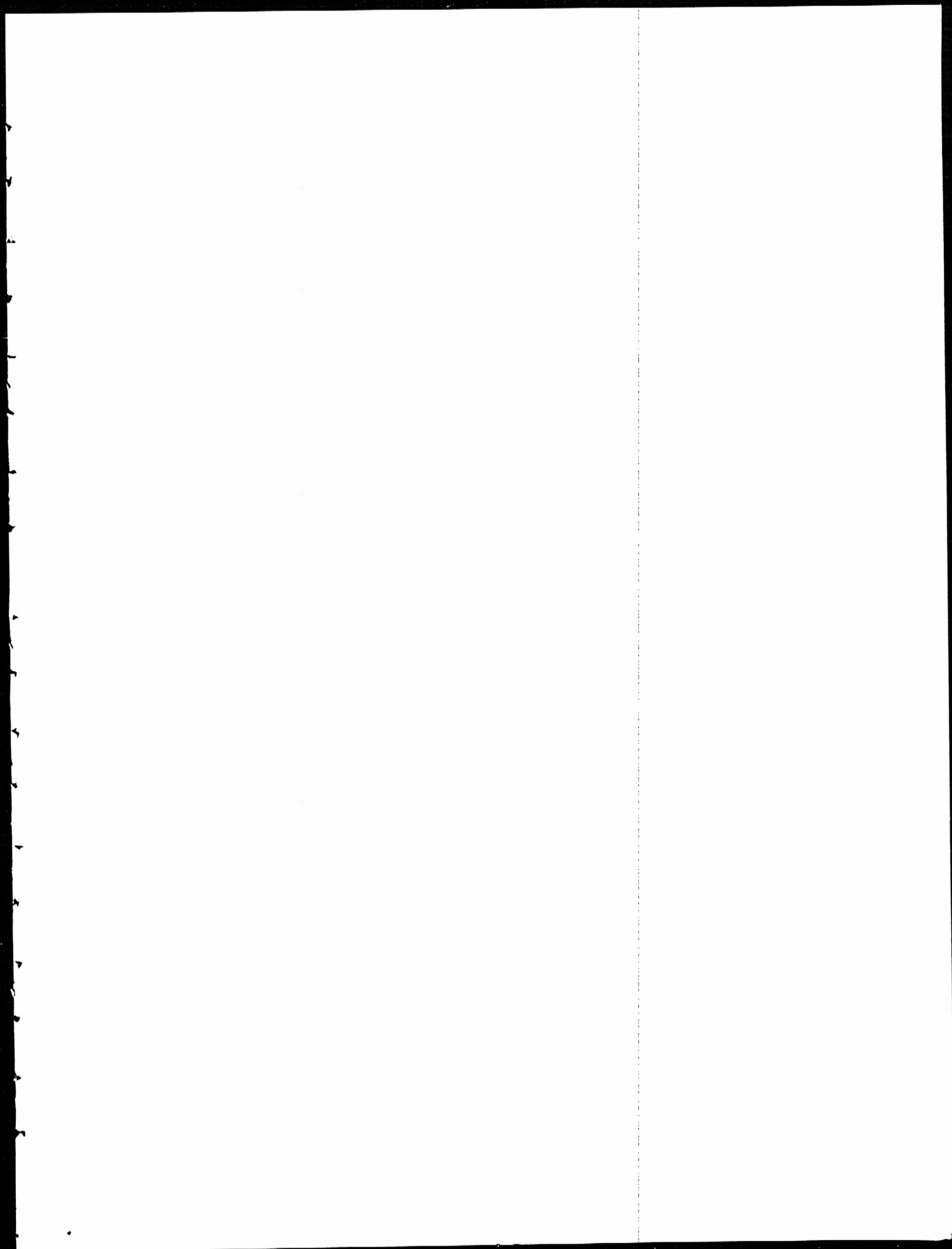
Conclusion

As the Government has failed to justify the judgment of the Court below, it should be reversed and vacated and Appellant released from custody.

Respectfully submitted,

John T. Miller, Jr.
Counsel for Appellant
(Appointed by This Court)

Washington, D. C.
January 26, 1966



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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,663

ROY A. SMITH, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 28 1966

DAVID G. BRESS,
United States Attorney.

Nathan J. Paulson
CLERK

FRANK Q. NEBEKER,
DAVID EPSTEIN,
HENRY J. MONAHAN,
Assistant United States Attorneys.

Cr. No. 145-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. On June 29 and July 6, 1965, appellant's 17(b) motions for the issuance of subpoenas were granted, and subpoenas were issued. The question under these circumstances is whether or not appellant has been denied enjoyment of his constitutional right to have compulsory process?

2. Appellant took the stand and testified. On cross-examination, he admitted three prior convictions and denied two. The question is whether appellant was prejudiced by the prosecutor's last two questions and his denial?

3. Was it plain error for the trial court to define the element of specific intent necessary for housebreaking in terms of "removal of property of another" and "taking the property of another", when the trial court had already read the statute to the jury, and appellant did not object to the instruction?

4. Was it plain error for the trial court, in its supplementary instructions on the difference between housebreaking and unlawful entry, to define the offense of unlawful entry in the conjunctive?

5. Was it plain error for the trial court to define reasonable doubt by reference to decisions the jurors make "in the more weighty and important matters relating to [their] personal affairs"?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,663

ROY A. SMITH, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Indicted for housebreaking and petit larceny, appellant was convicted by a jury of housebreaking and sentenced to imprisonment from two to eight years. An appeal at public expense was authorized by the District Court.

Events of the day preceding the offense

On December 21, 1964, Officers George C. Awkward and Albert C. Yeager were assigned to Precinct Number Six's Housebreaking Tactical Force. Awkward drove his

own car, accompanied by Yeager, and both were dressed in plain clothes (Tr. 13-14, 33). During their tour of duty, they had occasion to observe "not far from 306 Decatur [Street, Northwest]" a 1964 red Chevrolet convertible with white top, bearing D. C. license 4W 887,¹ "just driving around". (Tr. 14-15, 33-35, 40). They tailed the red Chevrolet for "at least 15 or 20 minutes" and eventually followed it into a service station, where both recognized appellant as one of the passengers. Appellant "was wearing dark clothing, sporty jacket-like." Suddenly, the red Chevrolet left the station "in a hurry." (Tr. 14-16, 23-24, 33-35).

Events of the day of the offense

About 10 A.M. on the morning of December 22nd, Awkward and Yeager saw the red Chevrolet parked in front of 306 Decatur Street, N.W. (Tr. 16-17, 34). After watching the car for a few minutes, Awkward decided to check the apartment building located at 306 Decatur Street, while Yeager checked 310 Decatur Street (Tr. 17, 36). As Awkward "opened the door to walk into the building", he saw that appellant² "had opened the door [of apartment 1] and was coming out and [appellant] pulled the door shut behind him." (Tr. 17-18, 24-25, 113). Appellant was wearing "a greenish type of I guess a sweater, Banlon type of shirt, dark trousers and shoes." (Tr. 18). As appellant walked by the officer out of the building, he spoke and said "something like 'Hi' or something of that sort." (Tr. 19). Awkward then proceeded to the second floor, glanced at the two apartments' doors to see if there had been a breaking, and rejoined Yeager outside. (Tr. 19). In the meantime, Yeager had checked the apartment building at 310 Decatur Street and was

¹ On December 22, 1964, the officers ascertained that the car was owned by Melvin Stanard (Tr. 23).

² Awkward testified that he had known appellant since 1962 (Tr. 24).

standing on the sidewalk. He saw appellant walk out of 306 Decatur Street "wearing a dark coat, a green type sporty sweater-like outfit." (Tr. 36-37, 40-41). Both officers then began walking in the direction appellant had taken, when they saw appellant turn around on the sidewalk, come back to the red Chevrolet, and drive away (Tr. 19-20, 38-39).

Both officers then returned to 306 Decatur Street to inspect more closely the door to apartment 1. They discovered that the "door was still open" and that it had been "jimmied" by the presence of "some fresh marks." (Tr. 20, 39, 42). They entered the apartment and found "the place in a shambles" (Tr. 20-21, 39).

Mrs. Ella A. McAdoo testified that about 4:50 A.M. on December 22nd she had left her "neat" apartment for work. When she returned later that morning, the bureau drawers had been emptied out on her bedroom floor; Christmas presents had been torn open; and bed linen and a brand-new heater had been moved from the bedroom to the front room.³ (Tr. 44-48).

Appellant's defense

Appellant, supported by his wife, relied on the defense of alibi. Mrs. Ann Smith testified that on the morning of December 22nd she and appellant awakened, decided to go downtown, dressed, had breakfast, and left home "about 9:30". (Tr. 53, 58). They planned to borrow a car from a friend—Melvin Stanard—and went to his house by bus (Tr. 53-54). They arrived "about 9:30." (Tr. 60). Since Melvin Stanard was not home, they decided to wait "up there for a little while to see if he would come home."⁴ (Tr. 53). During their two and a half hour wait, the only other person in the house was Mr. Stanard's father. Although they said, "Hello or Good

³ At the end of the Government's case-in-chief, Judge Corcoran dismissed the petit larceny count (Tr. 49-51).

⁴ Officer Yeager testified that Mrs. McAdoo's apartment is "approximately two" blocks away from Mr. Stanard's home (Tr. 84).

Morning," to him, they had no further conversation with him and did not even inquire of him when his son was expected to return home (Tr. 60-62). They left about noon-time for downtown (Tr. 53).

Appellant took the stand and testified that he "waited from nine o'clock until twelve o'clock" at Mr. Stanard's house for his return (Tr. 77-78). He admitted three prior convictions, but denied being in the vicinity of 306 Decatur Street, N.W., on December 22, 1964 (Tr. 69-70).

Rebuttal

Mrs. Carol Wilson, bookkeeper for Mrs. Smith's employer, testified that Mrs. Ann Smith "signed a daily time sheet" on December 22, 1964, and spent "eight" hours at work that day. (Tr. 96, 100, 102, 105). On surrebuttal, Mrs. Smith denied working on December 22nd, but admitted signing time sheets at the end of each day (Tr. 115-116).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 1801, provides:

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

SUMMARY OF ARGUMENT

I

Appellant not only did not waive his constitutional right to have compulsory process for obtaining witnesses in his favor but on two occasions—June 29 and July 6, 1965—exercised his right.

II

Appellant took the stand and testified in his own behalf. On cross-examination, he admitted three prior convictions and denied two. He now asserts that prejudice arose from the prosecutor's last two questions and his denial. But on an earlier occasion this Court could find no prejudice and suggested that the jury might well have concluded that appellant's testimony was true.

III

Appellant contends that the trial court's definition of the specific intent necessary to housebreaking in terms of "removal of property of another" and "taking the property of another" was plain error. But appellant did not object below; thus, the error, if any, is harmless. Moreover, as part of his instructions on the elements of housebreaking, the trial court did read the housebreaking statute to the jury, and this reading has been held to be a sufficient instruction.

IV

Appellant next contends that the trial court's supplementary instruction on the elements of unlawful entry, defining the offense "in the conjunctive", was plain error. But appellant did not object below, and the error, if any, is harmless. Considering the supplementary instructions on the *difference* between housebreaking and unlawful en-

try as a whole, it is plain that the former requires a specific intent, while the latter does not. Since the jury was instructed three times to begin their deliberations with the offense of housebreaking, and a verdict of housebreaking was returned, it follows that they must have determined that the requisite specific intent was present in the facts of the case.

V

Appellant finally contends that the trial court's instruction on reasonable doubt contained an erroneous standard of conduct for the jurors. But appellant did not object below, and the error, if any, is harmless. Moreover, this Court recently used the same standard in a suggested instruction.

ARGUMENT

I. Appellant enjoyed his constitutional right to have compulsory process.

By analogy to waiver of counsel and waiver of trial by jury cases, appellant contends for the first time on appeal that "[t]he Trial Judge should not have terminated the trial without first determining affirmatively on the record whether the accused, in an intelligent and competent manner, waived enjoyment of his constitutional right to have compulsory process for obtaining witnesses in his favor." (Brief for Appellant, i). But the record discloses not only that appellant did *not* waive his constitutional right to have compulsory process but that on two occasions—June 29, 1965⁵ and July 6, 1965⁶—he exercised his right to have compulsory process.

⁵ On June 29, 1965, appellant filed in the District Court a motion for issuance of subpoenas pursuant to Rule 17(b), F.R. Crim. P., and an affidavit in support of the motion. On the same day, Chief Judge McGuire granted the motion. This motion and supporting affidavit are part of the supplemental record on appeal.

⁶ On July 6, 1965, before the instant trial commenced at 11 A.M., Judge Corcoran, at the request of appellant's counsel, issued a

II. Impeachment by his prior convictions did not prejudice appellant.

(See Tr. 70)

Appellant contends that "the *prejudicial* effect of impeachment . . . far outweighed the probative relevance of the prior alleged and real convictions to the issue of credibility." (Brief for Appellant, 26). Here, appellant took the stand and testified without seeking a preliminary ruling as suggested in *Luck v. United States*, — U.S. App. D.C. —, 348 F.2d 763, 768, fn. 7 (1965).⁷ On cross-examination, he admitted three prior convictions (Tr. 70). Appellant's trial counsel did not object (Tr. 70). Since there was no objection, *Luck*, relied on by appellant, is not applicable.

Appellant next argues that he "was cast in the role of thief . . . [a]nd part of the persuasion was accomplished by reference to two crimes (out of five mentioned) for which he was not lawfully convicted." (Brief for Appellant, 24). Following the three convictions that appellant admitted, *supra*, the prosecutor asked him,

"Q. Are you the same Roy Smith, Jr., who was convicted of three counts of unauthorized use of a vehicle in December of 1962?

A. No, I am not. The case was reversed by the Court of Appeals.

Q. Were you convicted in January of 1963 of unauthorized use?

A. No, I was not." (Tr. 70).

The prosecutor abandoned the matter. Confronted with the same question, this Court held, in *Clifton v. United States*, 54 App. D.C. 104, 106, 295 F. 925, 927 (1923),

"forthwith" subpoena for Melvin Stanard. The subpoena was received by the United States Marshal at 11:09 A.M. The Marshal's return indicates, "Tried residence—no response (12:05 P.M.). This subpoena and return are part of the original record on appeal.

⁷ *Luck* was decided by this Court on May 21, 1965; appellant was tried July 6, 1965.

"Since defendant denied that he had been formerly convicted and counsel abandoned the matter, it is difficult to understand wherein defendant could be prejudiced. If the denial was false, counsel for the prosecution could have pursued the matter, and established the conviction by evidence aliunde. . . From the failure of the district attorney to pursue the matter beyond the cross-examination, the jury might well conclude or infer that defendant's testimony was true."

III. The trial court's instruction on the elements of housebreaking was not plain error.

(See Tr. 133-136, 140-142)

Appellant contends that his right to have the jury pass on each element of housebreaking "was denied when the Court instructed the Jury as to "intent" . . . in terms of "removal of property of another" or "taking the property of another", words which have no clear larcenous connotation." (Brief for Appellant, 9).

The trial court's instruction on the elements of the offense of housebreaking reads,

"When you retire to the jury room to deliberate on this case, you will be given a copy of the indictment to take with you. That indictment reads simply as follows:

The Grand Jury charges that on or about December 22, 1964, within the District of Columbia, Roy A. Smith, Jr. entered the apartment of Ella A. McAdoo with intent to steal property of another.

The statute on which that indictment is based reads as follows:

Whoever shall, either in the night or in the daytime, break and enter or enter without breaking any dwelling, bank, store, warehouse, shop, stable or other building, or any apartment or room whether at the time occupied or not, or

any steamboat, canal boat, vessel or other water craft or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with same, or to commit any criminal offense . . . is guilty of a crime.

In other words, the elements of the crime are these: There must be a breaking and an entering or an entry without breaking. The entry must be into a building whether or not it is occupied, or in an apartment or other dwelling place as far as this particular case is concerned. The place into which the breaking or entry is made must belong to another and the breaking or entry or entry without breaking must be done with the specific intent to commit a criminal offense, which in this particular case would be—if proved—the removal of property of another.

So in order for you to find the defendant guilty of housebreaking, you must find that the Government has proved beyond a reasonable doubt, one, that the defendant broke and entered or entered without breaking the apartment or dwelling of another, whether or not he took anything; and, two, that at the time the defendant intended to break and enter any part of that dwelling or apartment to remove any other thing belonging to another or that he did enter with or without breaking with the intent of committing a crime after the entry." (Tr. 133-135)

There was no objection by appellant (Tr. 136).

Upon receipt of a note from the jury requesting an explanation as to the difference between housebreaking and unlawful entry, the trial court instructed the jury:

"Let me explain it this way: The housebreaking with which the defendant is charged under the indictment has these elements: there must be a breaking and entering or even an entry without breaking into the premises. That is number one. Of course, it has to be into the building or apartment that we

are concerned with. The premises must belong to somebody else or be lawfully occupied by somebody else, but most important the breaking and entering must be done with the specific intent to commit some criminal act. And in this case the indictment, which I believe you have, charges that it was with the intent of taking the property of another from that place." (Tr. 140-141)

There was no objection by appellant (Tr. 142).

Since appellant did not object to the court's instructions on the elements of housebreaking, the error, if any, is harmless. Rule 30, F. R. Crim. P. To be plain error, the case must be sent "to the jury without instructions as to the elements of the offense which the Government must prove beyond a reasonable doubt. . ." *Byrd v. United States*, — U.S. App. D.C. —, 342 F.2d 939, 941 (1965). But here the trial court read the housebreaking statute to the jury as part of its instructions and, unlike *Byrd*, this is sufficient. *Wheeler v. United States*, 89 U.S. App. D.C. 143, 190 F.2d 663 (1951).

IV. The trial court's supplementary instruction on the elements of unlawful entry was not plain error.

(See Tr. 138-139, 141-142)

Appellant contends that the trial court's supplementary instruction on the elements of unlawful entry defined the offense "in the *conjunctive*" and "foreclosed further consideration by the Jury of unlawful entry as a possible basis for conviction. . ." (Brief for Appellant, 33).

The trial court's instruction on the elements of unlawful entry reads,

"THE COURT: Ladies and gentlemen of the jury, I have instructed you on the elements of the crime of housebreaking. I have also been asked to instruct you on a lesser offense that may be a possible verdict in this particular case, and that is the offense of unlawful entry.

Any person who without lawful authority enters or attempt to enter any public or private dwelling, building or other property or part of such building, dwelling or other property against the will of the lawful occupant or of the person lawfully in charge of such building, or being therein or thereon shall refuse to quit the same on demand of the lawful occupant or of the person lawfully in charge thereof is also guilty of a misdemeanor.

So that here you have three possible verdicts: If you find the elements of housebreaking to be present, you may find the defendant guilty of housebreaking or not guilty of housebreaking. You may find the defendant guilty of unlawful entry or not guilty of unlawful entry. And you may find the defendant not guilty of the charges mentioned." (Tr. 138-139)

There was no objection by appellant^s (Tr. 139).

Upon receipt of a note from the jury requesting an explanation as to the difference between housebreaking and unlawful entry, the trial court instructed the jury:

"Now, by contrast, an unlawful entry simply means that someone enters upon the premises lawfully occupied by another without their consent and, if asked to leave, refuses to leave at the request of the lawful occupant.

A quick example that comes to mind—Let us say some loiterer walks into the lobby of an apartment. He is asked by the desk clerk to leave, he is interfering with the traffic in the apartment building. He is there without the consent of the owner and he is there after the owner has asked him to leave and had a perfect right to ask him to leave but he is not there with intent to commit any crime, to steal or to do anything else. He is just hanging around the premises. That is an unlawful entry. It could be the same, entering someone's apartment without their permission. He may not be entering for the purpose

^s On appeal, appellant concedes that the trial court, in the passage just quoted, read the applicable statute to the jury (Brief for Appellant, 31).

of stealing or marring the furniture or doing anything unlawful, but he is there without the consent of the lawful occupant.

So in substance, the housebreaking requires a specific intent after the entry of committing a crime, and the unlawful entry does not require any specific intent to do anything after the entry except to remain on the premises without the consent of the owner.

I might add this, too, in case you are confused about the verdicts: You should consider first the charge in the indictment of housebreaking. Of course, if you find him guilty, that is the end of the case. If you find him not guilty, then you should consider the lesser charge of unlawful entry. Again, it is a case of finding him guilty of unlawful entry or not guilty. If you find he is not guilty of either crime, then, of course, he is acquitted.

Take them in the order in which he is charged. The first one is as indicted, housebreaking. If you dispose of that by a not guilty finding, then go to the unlawful entry and determine whether or not that crime has been committed. (Tr. 141-142)

There was no objection by appellant (Tr. 142).

While it is true that the trial court's supplementary instruction (Tr. 141) does contain the conjunction "and" on two occasions, it has long been held that the instruction must be viewed as a whole and that a part should not be extracted for undue stress. Viewing the supplementary instruction on the elements of unlawful entry (Tr. 141-142) as a whole, it is plain, we submit, that the essential difference between housebreaking and unlawful entry, namely, that housebreaking requires, and unlawful *does not*, a specific intent "to break and carry away any . . . thing . . . or to commit any criminal offense",⁹ was made abundantly clear to the jury. See *Stewart v. United States*, 116 U.S. App. D.C. 411, 324 F.2d 443 (1963). Moreover, the jury was instructed on *three* occasions

⁹ 22 D.C.C. 1801 (1961).

(Tr. 139, 142) to consider first the offense in the indictment—housebreaking—, and to either find appellant guilty or not guilty. Since the jury found appellant guilty of housebreaking, it must have determined that the specific intent “to break and carry away any . . . thing . . . or to commit any criminal offense” was present in the facts of this case. Thus, the jury did not have to reach consideration of the lesser-included offense of unlawful entry, and the alleged error in the supplementary instruction on the elements of unlawful entry, if it be so regarded, was harmless because of appellant’s failure to object, Rule 30, F. R. Crim. P., and the jury’s verdict. See *Stewart v. United States*, *supra*.

V. The trial court’s instruction on reasonable doubt was not plain error.

(Tr. 128-129)

Appellant further contends that defining reasonable doubt “by reference to decisions the jurors make ‘in the more weighty and important matters relating to (their) personal affairs’ ” is plain error.¹⁰ (Brief for Appellant, vi). But appellant did not object below; thus, the error, if any, is harmless. Rule 30, F.R. Crim. P. Moreover, the Supreme Court and this Court have approved the fol-

¹⁰ To support his contention, appellant relies on a trial court instruction considered in *Miles v. United States*, 103 U.S. 304, 309 (1880). The question on appeal was whether the instruction defining reasonable doubt was erroneous. The Supreme Court held:

“The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, *to the exclusion of all reasonable doubt*. Attempts to explain the term “reasonable doubt” do not usually result in making it any clearer to the minds of the jury. The language used in this case, however, was certainly very favorable to the accused, and is sustained by respectable authority. (Citations omitted). We think there was no error in the charge of which the plaintiff in error can justly complain.” 103 U.S. at 312. (Emphasis supplied.)

Thus, the narrowness of this holding undermines appellant’s construction of approval (Brief for Appellant, 35).

lowing standards of conduct: "more serious and important affairs of your own lives", *Holland v. United States*, 348 U.S. 121, 140 (1954); "in matters of importance to themselves", *Bishop v. United States*, 71 App. D.C. 132, 138, 107 F.2d 297, 303 (1939); "the graver, more important transactions of life"; "the more important affairs of your own life"; and "the more weighty and important matters in your own affairs", *Scurry v. United States*, No. 18633, decided April 15, 1965, slip opinion at 2-3; "the more weighty and important matters of their own affairs", *McGill and Hinton v. United States*, Nos. 18828-18829, decided June 29, 1965, slip opinion at 14.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
DAVID EPSTEIN,
HENRY J. MONAHAN,
Assistant United States Attorneys.

